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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE COMPANY,
Debtor.
_____/

In re:

USA CAPITAL REALTY ADVISORS, LLC,
Debtor.
_____/

In re:

USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,
Debtor.
_____/

In re:

USA SECURITIES, LLC,
Debtor.
_____/

CASE NOS: BK-5-06-10726 LBR
CASE NOS: BK-5-06-10727 LBR
CASE NOS. BK-5-06-10728 LBR
CASE NOS. BK-5-06-10729 LBR
CHAPTER 11
JOINTLY ADMINISTERED UNDER
CASE NO. BK-5-06-10725-LBR

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Co.
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed
☒ USA First Trust Deed Fund, LLC
_____/

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STANDARD PROPERTY DEVELOPMENT, LLC'S REPLY TO OPPOSITION OF MOTION FOR RELIEF FROM THE AUTOMATIC STAY

COMES NOW, Standard Property Development, LLC ("Standard Property"), by and through its undersigned counsel, and files this Reply in response to the Oppositions to the Motion for Relief from the Automatic Stay (the "Motion"), (collectively known as "Oppositions") filed by USA Commercial Mortgage Company ("USACM"), USA Capital First Trust Deed Fund, LLC ("Capital First") (collectively, the "Debtors"), Official Committee of Equity Security Holders of USA Capital First Deed Trust Fund, LLC (the "Equity Committee"), and the Official Committee Holders of Executory Contract Rights (the "Direct Lenders Committee") (known collectively as "Opponents").[1]

RESPONSE TO ALLEGATIONS BY THE OPPOSITIONS

Generally, the Opponents recite four basic arguments as to why the Motion should be denied: (1) the existence of a forum selection clause, a choice of law provision, and provision stating there is no requirement to fund, which allegedly causes the Florida court action (the "Lawsuit") to be meritless; (2) the Court should not interfere with the payment of interest; (3) the Curtis factors show that relief from the stay is not warranted; and (4) USACM is responsible for the defense of the Direct Lenders in litigation. Each of these four arguments is addressed below.

I. The Lawsuit Allegedly Lacks Merit

A. Choice of Law, Choice of Forum Provisions

The Opponents contest the Motion based upon a provision in the Loan Documents which they assert requires that any actions arising from the Loan Agreement to be brought in Clark County, Nevada. However, whether or not there is an enforceable forum selection clause does

[1] Unless otherwise defined, all capitalized terms have the meaning ascribed to them in the Motion.

not preclude the Lawsuit or the Debtors' liability in the Lawsuit, but only effects the forum in which the action will be brought.

Given the existing forum of the Lawsuit, Florida law will determine whether the forum selection clause should be enforced, or whether there is a reason not to do so. Kerr Construction, Inc. v. Peters Contracting, Inc., 767 So.2d 610, 612 (Fla.Dist.Ct.App. 2000). Standard Property believes there are several reasons which provide a basis to challenge the enforcement of the forum selection clause – fraud, inequity, multiplicity of suits, and a Florida public policy requiring that all Florida construction related litigation be brought in Florida. *See, e.g.,* Interval Marketing Associates, Inc. v. Sea Club Associates IV, LTD., 468 So.2d 262, 263 (Fla. Dist. Ct. App. 1985) (holding that a court is not bound to follow a forum selection clause, where there are compelling reasons not to enforce it, including the avoidance of multiple suits); Girdley Construction Company v. Architectural Exteriors, Inc., 517 So.2d 137, 138 (Fla. Dist. Ct. App. 1987) (transferring the lawsuit would result in multiple suits and a splitting of the cause of action, therefore provision should not be enforced); Kerr Construction, Inc., 767 So.2d at 612 (Forum selection clause is void as a matter of public policy based on provisions of Fla. Stat. §47.025); W.G. Mills, Inc. v. Hughes Supply, Inc., 816 So.2d 225, 226 (Fla. Dist. Ct. App. 2002) (there are circumstances to which the court has discretion not to give effect to a forum selection clause). In this instance, Standard Property believes the applicable court may well conclude that Florida is the appropriate forum to resolve all of the related disputes between Standard Property and the Direct Lenders, including any foreclosure claim the Direct Lenders may bring.

As such, this argument should not prelude the Court from rendering a decision on lifting the automatic stay so the two applicable Debtors might be included in ongoing litigation. Given that one element of the dispute may only be had in the courts of Orange County, Florida – the

foreclosure element – there is likely a legitimate basis to conclude that all claims and causes of action be litigated together, including (for purposes of the liquidation of the claims only) those against the two applicable Debtors. Otherwise, the cost to the parties of duplicative, parallel track proceedings is apparent, and creates a risk of inconsistent results and unnecessary cost and expense to all parties.

Additionally, the Opponents challenge the Lawsuit based on a choice of law provision. This argument should not weigh on the Court, as even assuming the Opponents are correct, this would do nothing more than have the Florida court (or whatever court ultimately hears the case) apply Nevada law. Courts commonly apply the laws of various states and nothing would stand to oppose the belief that they could not perform the same function with Nevada law. As such, even assuming their argument is correct, this would not preclude the lawsuit and should not weigh into the decision of the Court when examining the Curtis factors assessing whether lifting the automatic stay is appropriate.

B. Increase in Loan Amount precluded by the Contract

The Opponents argue that the lawsuit lacks merit because any requirement of additional funding is precluded by Paragraph 3.2 of the Construction Loan Agreement which states:

> "Lender and USA shall have the exclusive right, but not the obligation, to increase the Loan Amount to an amount not to exceed Seventeen Million Seven Hundred Fifty Thousand Dollars ($17,750,000.00)."

However, what the Opponents fail to mention is that the Direct Lenders (and USACM) did commence funding the Construction Loan Agreement in accordance with the obligation to fund the entire Seventeen Million Seven Hundred Fifty Thousand Dollars (17,750,000.00) amount of the Note. That construction funding is entirely consistent with the decision to execute

a promissory note in the amount of $17,750,000.00 (not $8.24 million), as well as, presumably, the general business practices of USACM.

As such, among other things, the totality of the Note in the amount of the entire acquisition and construction costs, the Disbursement Schedule attached to the Construction Loan Document and the Construction Loan Agreement provisions generally, the USCAM business practices generally, and the actions of the Direct Lenders and their agent in commencing funding of the construction portion loan provide amplification of the correct interpretation of Paragraph 3.2 of the Construction Loan Agreement. While the court trying the Lawsuit will eventually need to interpret paragraph 3.2 – whether it is ambiguous, inconsistent or contradictory, or consistent with the balance of the documents if interpreted in a certain manner, that, again, is not a basis for denying whatever court (and Standard Property) the opportunity to do just that.

In Florida, "construction of a contract is ordinarily a question of law for the trial court provided that the terms used are unequivocal, clear, undisputed, and not subject to conflicting inferences." Chhabra v. Morales, 906 So.2d 1261 (Fla. Dist. Ct. App. 2005) (*quoting* Segal v. Rhumbline Int'l, Inc., 688 So.2d 397, 398 (Fla. Dist. Ct. App. 1997)). "However, when the terms of a written instrument are disputed and rationally susceptible to more than one construction, an issue of fact is presented which cannot properly be resolved by summary judgment." Id. When an agreement is susceptible to more than one construction, it is therefore ambiguous. *See* Strama v. Union Fid. Life Ins. Co., 793 So.2d 1129, 1132 (Fla. Dist. Ct. App. 2001) (holding that when a contract is ambiguous because it is susceptible to different interpretations, parol evidence is admissible to explain or clarify ambiguous term); Gorman v. Kelly, 658 So.2d 1049, 1052 (Fla. Dist. Ct. App. 1995) ("Where a term in a contract is ambiguous or unclear, 'the court may consider extrinsic matters not to vary the terms of the

contract, but to explain, clarify or elucidate the ambiguous language with reference to the subject matter of the contract, the circumstances surrounding its making, and relation of the parties.'"); Specialty Rests. Corp. v. City of Miami, 501 So.2d 101, 103 (Fla. Dist. Ct. App. 1987) ("A contract is ambiguous when its language is reasonably susceptible to more than one interpretation, or is subject to conflicting inferences.")

Additionally, in finding a contract ambiguous, if there are two interpretations equally plausible, then the contract is construed against the draftsman. Gorman, 658 So.2d at 1052 (*quoting* Vienneau v. Metro. Life Ins. Co., 548 So.2d 856, 859 (Fla. Dist. Ct. App. 1989)); Bacardi v. Bacardi, 386 So.2d 1201, 1203 (Fla. Dist. Ct. App. 1980) ("When a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties.").

The Opponents argue that under Nevada law, if a contract that is clear on its face, interpretation is a matter of law, and the court will enforce the contract as written. Chwialkowski v. Sachs, 834 P.2d 404, 406-407 (Nev. 1992)). However, as stated by the Nevada Supreme Court in Ringle v. Bruton, 120 Nev. 82, 86 P.2d 1032, 1039 (2004) and numerous other times:[2]

> "When contract language is ambiguous and incomplete, however, extrinsic evidence may be admitted to determine the parties' intent, explain ambiguities, and supply omissions. In determining the parties' intent, the trier of fact must construe the contract as a whole, including consideration of the contract's subject matter and objective, the circumstances of its drafting and execution, and the parties' subsequent conduct. Ambiguous terms should be construed against the party who drafted them, …."

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[2] Ringle v. Bruton, 120 Nev. 82, 86 P.3d 1032, 1039 (2004); Sandy Valley Assocs. V. Sky Ranch Estates, 117 Nev. 948, 35 P.3d 964, 967-68 (2001); Siggelkow v. Phoenix Ins. Co., 109 Nev. 42, 44, 846 P.2d 303, 304 (1993) (holding that a court must construe an insurance contract as a whole in order to give reasonable and harmonious meaning to the entire contract).

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Additionally, in Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 510, the Supreme Court stated:

> "'A contract is ambiguous if it is susceptible to more than one interpretation." Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994); *see also* Pressler v. City of Reno, 118 Nev. 506, ---, 50 P.3d 1096, 1098 (2002). The best approach for interpreting an ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties." Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 231, 808 P.2d 919, 921 (1991). This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties. *See* Trans Western Leasing v. Corrao Constr. Co., 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982). Also, a specific provision will qualify the meaning of a general provision. *See* Mayer v. Pierce County Medical Bureau, 80 Wash. App. 416, 909 P.2d 1323, 1327 (1995). Finally, "[a]n interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract." Dickenson v. State, Dep't of Wildlife, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994)."

The applicable language, when read in conjunction with the remainder of the documents, is capable of several interpretations. Even if it was not, the good faith and fair dealing overlay to all contracts, including these, still remains. As such, the ambiguous, conflicting provisions may well require a court to examine the surrounding circumstances to determine the intent.

What is demonstrated by all 3 Oppositions is that USACM, given that was the agent of the Direct Lenders, is an appropriate participant in the Lawsuit for a variety of reasons and purposes, including in order to supply knowledge of the facts and circumstances surrounding the initiation of the loan. This is another factor that the Court should consider when deciding whether to allow the lifting of the automatic stay so that all appropriate parties be included in the Lawsuit and a just outcome can be determined in a single proceeding.

C. USACM Had No Authority to Promise Additional Funding

This argument is without merit as USACM has at all times represented to Standard Property, that it had and has full power to bind Direct Lenders to any and all agreements. Indeed

the whole USACM business model, as evidenced by the limited powers of attorney, is premised on the fact that USACM is an apparent, if not express, agent of the Direct Lenders and has the ability to bind them to obligations to fund. Alleged agreements between the Direct Lenders and USACM to the contrary, to which Standard Property was not a party, are of no moment.

D. Court Should Not Interfere With the Payment of Interest

The Opponents argue that Standard Property does not have the right to interfere with the interest payments as they have waived their right to offset. Standard Property has not asked for an offset;[3] rather the relief sought is simply to maintain the interest reserve until such time as the litigation involving the parties has run its course. To the extent funds are disbursed by PDG to one of the Debtors, which then disburses such monies to the Direct Lenders, such disbursement increases the burden and expense upon Standard Property, and unduly prejudices Standard Property in its efforts to recover the damages it claims to be due it by the Direct Lenders. On the other hand, no damage or harm will befall the Direct Lenders, given that the status quo will be maintained, and the funds presumptively retained by PDG, pending ultimate resolution of the disputes between the parties regarding to whom such amounts should be paid. Simply preserving the status quo, without prejudice to any of the parties, would seem to be more than sufficient cause for permitting Standard Property to provide such notice to PDG. As such, there

[3] Authorities generally suggest that recoupment, as opposed to setoff, is not prohibited by the automatic stay. The claims at issue here – the amount allegedly owing the Direct Lenders pursuant to the applicable loan documents and the amount Standard Property contends is owed it for breach of the Construction Loan Agreement and other loan documents, might well be characterized as recoupment. For resolution purposes of the pending motion, that characterization need not be resolved: Standard Property is not seeking, at this point, authorization to setoff or recoup the amount allegedly owing by any Debtor or the Direct Lenders against any interest payment. The relief sought here is far more limited.

is no logical reason to not allow the automatic stay to be lifted for Standard Property to instruct PDG not to disperse interest payments.

Standard Property has reason to believe that this issue might be moot as there is some indication that the interest reserve has been depleted. If this is in fact the case, then this would render the request to give notice to cease releasing funds from the interest reserve moot. However, if there remains an interest reserve, then Standard Property insists, for the reasons stated above, that the stay should be lifted so as to allow Standard Property to give notice to PDG to withhold all remaining interest payments.

E. Curtis Factors Suggest that the Motion Should Not Be Granted

The second element of the relief sought – that Stand Property be permitted to add the two applicable Debtors as defendants in the Lawsuit- does nothing more than add two additional parties of some importance to a proceeding that is currently ongoing against 140 individuals and entities. With this backdrop, and considering that the Direct Lenders themselves are not debtors and therefore the litigation against them in a non-bankruptcy forum is free to proceed (whether in Florida or Nevada), it would seem appropriate that all claims by and among the parties related to the Property, and the funding of the project, be undertaken in one forum, at one time.

Obviously, the decision to modify the automatic stay "is within the discretion of the bankruptcy judge," and that "[b]ecause there is no clear definition of what constitutes "cause," discretionary relief from the stay must be determined on a case by case basis." See Debtors Motion in Opposition, p.4, ln. 6-10. Standard Property agrees that, as stated in In re Plumberex Specialty Products, Inc., 311 B.R. 551, 556-57 (Bankr. C.D. Cal. 2004):

> Section 362(d)(1) directs the court to grant relief from the automatic stay upon a showing of "cause." Although the term "cause" is not defined in the Code, courts in the Ninth Circuit have granted relief from the stay under § 362(d)(1) when necessary to permit pending litigation to be concluded in another forum ***if the***

> ***non-bankruptcy suit involves multiple parties*** or is ready for trial. (Emphasis Added). *See*, e.g., Christenson v. Tucson Estates, Inc. (In re Tucson Estates, Inc.) 912 F.2d 1162, 1166 (9th Cir. 1990) (stating that "[w]here a bankruptcy curt may abstain from deciding issues in favor of an imminent state court trial involving the same issues, cause may exist for lifting the stay as to the state court trial."); Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble), 776 F.2d 802, 807 (9th Cir. 1985) (affirming an order lifting the stay to permit a creditor to pursue a conversion and fraudulent conveyance action pending in the federal district court following a remand of the case by the appellate court for a retrial on the damages issues); Santa Clara, 180 B.R. at 567 (affirming an order lifting the stay to allow prosecution of a pending Title VII claim against the debtor in the federal district court.)***[I]t will often be more appropriate to permit proceedings to continue in their place of origin, *when no great prejudice to the bankruptcy estate would result*, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere. H.R. Rep. No. 95-595, at 341 (1977); S. Rep. No. 95-989, at 50 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5836. Judicial economy is a factor to be considered by bankruptcy courts when deciding to lift stay issues. *See* Piomo Corp. v. Castlerock Prop. (In re Castlerock Prop.), 781 F.2d 159, 163 (9th Cir. 1986); Kemble, 776 F.2d at 807; Santa Clara, 180 B.R. at 566.

Plumberex describes the burden of proof of a motion to lift the automatic stay as follows:

> The burden of proof on a motion to modify the automatic stay is a shifting one. Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1285 (2nd Cir. 1990). To obtain relief from the automatic stay, the party seeking the relief must first establish a *prima facie* case that "cause" exists for relief under § 362(d)(1). Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 142 (2nd Cir. 1999); Duvar Apt., Inc. v. Fed. Deposit Ins. Corp. (In re Duvar Apt., Inc.), 205 B.R. 196, 200 (9th Cir. BAP 1996); FSFG Serv. Corp. v. Kim (In re Kim), 71 B.R. 1011, 1015 (Bankr. C.D. Cal. 1987). Once a prima facie case has been established, the burden shifts to the debtor to show that relief from the stay is unwarranted. Sonnax, 907 F.2d at 1285; Duvar Apt., 205 B.R. at 200. If the movant fails to meet its initial burden to demonstrate cause, relief from the automatic stay should be denied. Spencer v. Bogdanovich (In re Bogdanovich), 292 F.3d 104, 110 (2nd Cir. 2002); Mazzeo, 167 F.3d at 142; Kim, 71 B.R. at 1015.

Standard Property has met this burden by arguing in the Motion that the Curtis[4] factors militate in favor of the Court to lifting the automatic stay. The opponents cite various cases that

[4] See, e.g., In re Curtis, 40 B.R. 795 (Bankr. Utah 1984); In re Plumberex Specialty Products, Inc., 311 B.R. 551, 558-59 (Bank. C.D. Cal. 2004).

(cont.)

would either re-list the Curtis factors, or narrow and focus on only a few of such factors, or similar considerations. *See*, *e.g.*, In re Curtis, 40 B.R. 795 (Bankr. Utah 1984); In re Plumberex Specialty Products, Inc., 311 B.R. 551, 558-59 (Bank. C.D. Cal. 2004).

A consideration of the Sonnox[5] factors, relied upon by one or more of the Opponents, by Standard Property suggests that the stay should be modified as it requests:

(1) Stay relief would result in a complete resolution of the issues relating to the Property because this Court could limit stay relief to only cross-claims that have to do with the Property;

(2) USACM's inclusion in the lawsuit may result in a recognition on behalf of USACM to defend the Direct Lenders and actually result in a lessening of the financial burden in the Lawsuit to the Direct Lenders;

(3) There might well be a fiduciary relationship between the Direct Lenders and USACM;

(4) While there is no specialized tribunal yet (i.e., the Florida state court is more familiar with Florida foreclosure and related lender litigation), this is in part due to the generous answer filing deadline to which Standard Property (at USACM's request)has agreed;

(5) The action involves a number of third parties and will continue whether or not the Debtors are included. The Direct Lenders (through their agent, USACM) breached a loan commitment, and as such, the appropriateness for the Debtors being added to the Lawsuit is apparent;

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[5] Sonnox Industries, Inc. v. Tri Components Prods. Corp., 907 F.2d 1280, 1285 (2d. Cir. 1990) (reiterating the Curtis factors).

(6) The Direct Lenders are individuals located throughout the country and will be no more inconvenienced by Florida litigation than in Nevada. In any event, the Direct Lenders – and the applicable Debtors, if defendants – can certainly seek dismissal or transfer (as appropriate) based upon the forum selection clause or otherwise;

(7) The interests of judicial economy will be served by allowing the Debtors to be added as parties, for purposes of claim liquidation and completeness of the proceeding. Otherwise, the cost to the parties of duplication, parallel track proceedings, is apparent, and creates a risk of inconsistent results and unnecessary cost and expense to all parties.

The most telling consideration is simple: given that certain elements of the dispute may only be had in the courts of Orange County, Florida – the foreclosure element – it only makes sense that all such claims and causes of action be litigated together, including (for purposes of the liquidation of the claims only) those against the two applicable Debtors. It is therefore consistent with the Curtis factors for the Court to lift the automatic stay and allow the Debtors be allowed to be attached in the Orange County litigation.

F. USACM Is Responsible for the defense of the Direct Lenders in Litigation

Standard Property can not respond to this assertion as it seems to be an attack on the Debtors, and really a complaint by the Direct Lenders Committee about the Debtors. Since this element of the Opposition does not ask the Court – in any existing procedural context -- to do anything, and simply addresses a concern that the Direct Lenders have regarding USACM's alleged unwillingness to represent them in the Lawsuit, this argument should not be addressed by the Court.

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II. CONCLUSION

WHEREFORE, Standard Property continues to request the entry of an order in its favor as follows:

(1) To provide any and all notice necessary or appropriate under the terms of the Control Agreement to notify PDG of the Direct Lenders' alleged breach of the applicable loan agreements, and instructing PDG to withhold payment of any further interest amounts;

(2) To permit Standard Property to add USA and the Trust as additional defendants in the Orange County, Florida Action in order to liquidate the claims against those parties simultaneous with the liquidation of the related claims against the other Direct Lenders; and

(3) For such other and further relief as this Court deems just and proper.

Dated this 15th day of August, 2006.

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CERTIFICATE OF SERVICE

This is to certify that I have this 15th day of August 2006, served a copy of the foregoing by regular U.S. Mail, postage prepaid thereon, to those persons set forth on the attached matrix.

/s/ Andrew M. Brumby
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